82-1443

IN THE

Supreme Court of the United States

October Term, 1982

No. _____

DONALD KINNEY AND MARGARET KINNEY,
Petitioners,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ARTHUR W. TEAGUE, MANUEL MENDOZA, GERALD W. STRICKLAND, THOMAS A. SIMONS, IV, CLEMENT VAUGHAN and EDWARD B. RUST,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

RUSSELL D. MANN
BOB F. TURNER
CHARLES F. MALONE
Post Office Drawer 700
Roswell, New Mexico 88201
Counsel for Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CONSTITUTIONAL PROVISIONS AND STATUTES:

OTHER AUTHORITIES:

IN THE

Supreme Court of the United States

October Term, 1982

No. _____

DONALD KINNEY AND MARGARET KINNEY,
Petitioners,

vs.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, ARTHUR W. TEAGUE, MANUEL MENDOZA, GERALD W. STRICKLAND, THOMAS A. SIMONS, IV, CLEMENT VAUGHAN and EDWARD B. RUST,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINION BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit (Appendix A of Petition, pp. 29-31) was marked "NOT FOR ROUTINE PUBLICATION," and will therefore not be published.

JURISDICTION

There is no jurisdiction to review the decision of the United States Court of Appeals for the Tenth Circuit inasmuch as Petitioner's Complaint (Appendix B of Petition, pp. 32-44) in the United States District Court for the District of New Mexico was defective on its face in failing to allege sufficient facts on which the District Court could properly satisfy the requirements for subject matter jurisdiction.

QUESTION PRESENTED

Whether a Complaint in Federal Court may be dismissed upon the Court's Motion without notice and hearing where it appears beyond doubt that the Plaintiff can prove no set of facts in support of his claim which would entitle him to relief.

STATEMENT

The Petition follows affirmance by the United States Court of Appeals for the Tenth Circuit of the decision of the United States District Court for the District of New Mexico to dismiss Petitioners' Complaint filed therein. Petitioners' Complaint was based on alleged violations of 42 U.S.C. §1983 and §1985, by virtue of alleged conspiratorial practices by and among the named Defendants.

Petitioners were at one time insureds of Respondent State Farm Mutual Automobile Insurance Company.

Following an automobile accident on November 3, 1979, Petitioner Donald Kinney was sued in state court in New Mexico for wrongful death damages, and pursuant to Respondent State Farm's Automobile Liability Policy issued to Donald Kinney, said suit was referred to the law firm of Klecan & Roach, P.A., of Albuquerque, New Mexico, for defense. A trial was held thereon and a verdict was rendered in favor of Donald Kinney. Following the trial, Respondent State Farm severed its attorney-client relationship with the law firm of Klecan & Roach. The trial court decision in favor of Donald Kinney was appealed, and Respondent State Farm retained counsel other than the firm of Klecan & Roach to represent State Farm and Mr. and Mrs. Kinney during the course of the appeal. The appeal progressed satisfactorily, culminating in the decision of the New Mexico Supreme Court that Petitioner was not liable to Plaintiff in the state court proceeding.[1]

Following the change of counsel by Respondent State Farm, but prior to issuance of the aforementioned opinion in the New Mexico Supreme Court, Petitioners filed a Complaint in the United States District Court for the District of New Mexico alleging that substitution of counsel by Respondent State Farm wrongfully deprived Petitioners of various civil rights guaranteed under 42 U.S.C. §1983 and §1985. The Complaint was defective on its face inasmuch as it did not allege sufficient facts on which the District Court could base jurisdiction, nor could the defect in the Complaint be cured by amendment or argument. The District Court therefore dismissed the Complaint for lack of jurisdiction, and Petitioners appealed the dismissal to the Tenth Circuit where the dismissal was affirmed.

[1] *Kinney v. Luther*, 97 N.M. 475, 641 P.2d 506 (1928)

ARGUMENT

I.

THE DISTRICT COURT'S DISMISSAL OF PETITIONERS' ORIGINAL COMPLAINT WAS PROPER BECAUSE THE COURT'S LACK OF JURISDICTION WAS APPARENT ON THE FACE OF THE COMPLAINT AND WAS NOT CURABLE INASMUCH AS PETITIONERS CANNOT MEET THE REQUIREMENTS OF 42 U.S.C.A. §1983

Lack of subject matter jurisdiction may be raised at any time before, during, or after litigation of an action, by either of the parties or by the court.[2] Courts are under a positive duty to act to dismiss an action at any time that it appears the court lacks the power to adjudicate the action. Although such dismissals generally follow an opportunity for the adversely affected party to be heard, if the jurisdictional defect appears on the face of the Complaint, and is incurable, as is the case here, it is proper for the court, *sua sponte*, to dismiss for lack of jurisdiction, and the court need not grant an opportunity for oral argument to the adversely affected party.

Federal courts are courts of limited jurisdiction, the limitation on their power to adjudicate being derived both from the Constitution and from the laws of the United States. To entertain an action, the court must first satisfy itself that the action is within the class of actions which the court has power to adjudicate under the Constitution. Thus satisfied, the court must then determine whether the action arises under the laws of the United States. If the action does not arise under the laws of the United States, the court is simply without power to adjudicate the controversy, and must dismiss for lack of subject matter jurisdiction.

[2] Rule 12(h)(3) Fed. R. Civ. Pro.

In addition, this Court has determined that not all actions arising under the laws of the United States confer jurisdiction upon the federal courts. Instead, the Court has held that the action must present a substantial federal claim.[3] Thus, if there is no substantial federal question arising under the laws of the United States, the federal courts lack the power to adjudicate the controversy, and must dismiss the action for lack of jurisdiction.[4]

This concept of limited federal jurisdiction is so fundamental to our judicial system, and so important to the maintenance of the constitutionally mandated separation of federal and state judiciaries, that lack of subject matter jurisdiction may be raised at any time before, during, and even after litigation of the action, by either of the parties or the judge.[5] In fact, the judge is under a positive duty to act to dismiss an action at any time that it appears the court lacks the power to adjudicate the action.

Although the general rule is that such dismissals must follow an opportunity for the adversely affected party to present his arguments against the dismissal, there are circumstances where it is proper for the court to dismiss for lack of jurisdiction *sua sponte* and without an opportunity for the party to be heard. One such circumstance involves an incurable jurisdictional defect in the Complaint, and when there are no facts which might be alleged that would support jurisdiction, an opportunity to be heard would be fruitless.[6]

[3] *The Fair v. Kohler Die & Specialty Co.*, 228 U.S. 22, 33 S.Ct. 410, 57 L.Ed. 716 (1913); *Montana-Dakota Company v. Northwestern Public Service Company*, 341 U.S. 246, 71 S.Ct. 692, 95 L.Ed. 912 (1951)

[4] 13 Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction* §§3522, 3564 (1975)

[5] Rule 12(h)(3) Fed. R. Civ. P.

[6] *Topping v. Fry*, 147 F.2d 715 (7th Cir. 1945); *Harmon v. Superior Court of California*, 307 F.2d 796 (9th Cir. 1962); *American Federation of Musicians v. Bonatz*, 475 F.2d 433 (3rd Cir. 1973); *Conley v. Gibson*, 355 U.S. 41, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); 5 Wright & Miller, *Federal Practice and Civil Procedure* §1350 (1973)

The decision in *Topping v. Fry*,[7], for example, involved an action to recover damages for the "failure to exploit Plaintiff's patents," in which the Defendants were two corporations and an individual. Plaintiff refrained from naming one of the corporations as a party Defendant because doing so would have deprived the court of diversity jurisdiction. The two remaining Defendants filed separate motions to dismiss the Complaint, which were directed both to jurisdiction and to the merits. The jurisdictional issue addressed by the court was whether Plaintiff had demonstrated potential recovery of the requisite jurisdictional amount. The District Court granted the Defendant's Motion to Dismiss, denying Plaintiff's Motion for Oral Argument, but the Court failed to show the grounds on which the dismissal was based. In reversing the lower court dismissal, the Seventh Circuit pointed out that ordinarily the Plaintiff would be entitled to an opportunity to establish his jurisdictional facts ". . . unless it is clear from the face of the pleadings that that would be impossible. . . ."[8] Similar language is found in the opinion in *Harmon v. The Superior Court of the State of California*,[9] in which the Ninth Circuit stated that a district court "cannot dismiss for lack of jurisdiction, without giving the Plaintiff an opportunity to be heard, *unless such lack appears on the face of the Complaint and is obviously not curable.*" (Emphasis added).

In order to determine the propriety of the District Court's dismissal in the case at bar, it will therefore be necessary to analyze Petitioners' cause of action and Complaint to determine whether it is clear from the face of Petitioners' pleadings that the lack of jurisdiction cannot be cured, as required under *Topping* and *Harmon*, *supra*.

---

[7] *Ibid.*

[8] 147 F.2d at 718.

[9] 307 F.2d 796, 797 (9th Cir. 1962)

Petitioners bring their action under 42 U.S.C.A. §1983 and §1985. Turning first to §1983, a plain requirement of that section is that defendants must have acted "under color of" state law.[10] A recent interpretaton of "under color of" state law is found in the decision of this Court in *Dennis v. Sparks*.[11] There, a state district judge enjoined the production of minerals from certain oil leases. The injunction was subsequently dissolved by an appellate court as having been illegally issued, and the parties against whom the injunction had been issued filed a Complaint in the United States District Court for the Southern District of Texas, purporting to state a cause of action for damages under §1983. Defendants were the corporation which had obtained the injunction, the sole owner of the corporation, and the judge who entered the injunction. The Federal District Court held that because the injunction was a judicial act within the jurisdiction of the State Court, the judge was immune from liability in a §1983 suit. The Court further held that following dismissal of the judge from the action, the remaining Defendants could not be said to have conspired under color of state law within the meaning of §1983, and the action against them was similarly dismissed.

On appeal, the Fifth Circuit pointed out that "under color of" state law for purposes of §1983 does not require that a defendant be an officer of the state. This Court agreed, adding that "it is enough that he is a willful participant in joint action with the State or its agents.[12] This Court went on to point out that "private persons jointly

[10] *Aasum v. Good Samaritan Hospital*, 542 F.2d 792, 794 (9th Cir. 1976). For a detailed discussion of the Legislative history of §1983, and definition of "color of law," see, *e.g.*, *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961); *Mitchum v. Foster*, 407 U.S. 225, 92 S.Ct. 2151, 32 L.Ed.2d 705 (1972).

[11] 449 U.S. 24, 101 S.Ct. 183, 66 L.Ed.2d 185 (1980).

[12] 66 L.Ed.2d at 189

engaged with state officials. . . , are acting 'under color' of law for purposes of §1983 actions," but cautioned that "merely resorting to the courts. . . does not make a party a co-conspirator or joint actor with the judge".[13]

Respondents are all private individuals, and are not officers of the State. Under the authority of *Dennis v. Sparks*, they cannot be said to be acting "under color of" state law for purposes of §1983 unless they are shown to be "willful participants in joint action with the State or its agents." Petitioners make no such showing, nor would they have been able to do so had they been given an opportunity for oral argument in District Court. It is therefore clear from the face of their pleadings that it would have been impossible for Petitioners to establish jurisdictional facts, even given the benefit of oral argument; and as established by the decisions in *Topping* and *Harmon, supra*, under such circumstances, dismissal by the Court on jurisdictional grounds without oral argument was entirely proper.

In support of their allegations of conspiracy, Petitioners apparently contend that Defendant Thomas A. Simons, IV, was acting under color of law for purposes of §1983 by virtue of his status as a practicing attorney licensed by the State of New Mexico[14]. If Petitioners are in fact alleging that those acts performed by a member of the New Mexico State Bar Association qualify as acts done by an officer of the State, thereby invoking jurisdiction under §1983, it should be noted that existing case law clearly establishes that attorneys, simply because of their membership in a state bar association, are not officers of the state, but remain instead private individuals. In *Rhodes v. Meyer*,[15] the Plaintiff brought an action against certain state judges, state officials, and members

[13] *Id.* at 190.

[14] See Plaintiff's Complaint, Paragraphs XIX through XXIII.

[15] 225 F. Supp. 80 (D. Neb. 1963)

of the bar for damages arising out of the prosecution of Plaintiff for contempt. In his Complaint, Plaintiff alleged that the members of the bar were acting under color of law and the authority of their office as attorneys and as members of the Nebraska State Bar, which Plaintiff contended was an official arm and organ of the State of Nebraska. In denying the status of the attorneys as officers of the state, the Court was quick to point out that if Plaintiff were undertaking to attribute to every act performed by a member of the Nebraska State Bar Association the quality of an act done under color of law as an officer of the state, thereby invoking the jurisdiction of the Federal District Courts under the Civil Rights Act, then Plaintiff "is leaning on a broken reed. The notion is simply absurd."[16]

The cases cited by Petitioners in their Petition can generally be distinguished from the case at bar on either of three bases. First, despite the general rule that dismissal is improper in the absence of notice and a hearing, there is an exception to this general rule which permits dismissal by the trial court for lack of jurisdiction under circumstances in which the lack of jurisdiction is clear from the face of the pleadings and is obviously not curable. None of the cases cited by Petitioners in their Petition involved fact situations falling under this exception. It should be noted that two of the cases cited by Petitioners, namely *Harmon*, *supra*, and *American Federation of Musicians v. Bonatz*, *supra*, clearly recognize this exception to the general rule, noting that dismissal *sua sponte* for lack of jurisdiction and without an opportunity for the adversely affected party to be heard is proper where "such lack [of jurisdiction] appears

[16] 225 F.Supp. at 93-94. See also, *Phillips v. Fisher*, 445 F.Supp. 552 (D. Kan. 1977); *Waits v. McGown*, 516 F.2d 303 (3rd Cir. 1975); *Hamrick v. Norton*, 322 F.Supp. 424 (D. Kan. 1970), aff'd. 436 F.2d 940 (10th Cir. 1971).

on the face of the Complaint and is obviously not curable."[17]

Second, certain of Petitioners' cited cases deal with dismissals on the merits which, with their *res judicata* effect, are also inapposite under the facts of the instant case.[18] *Herzog and Straus v. GRT Corp., supra,* for example, involved an issue of summary judgment which affected the merits of the controversy and which might have had a preclusive effect on further litigation on the merits. Thus, *Herzog* and similar cases are distinguishable from the instant jurisdictional dismissal.

Third, other cases cited by Petitioners involve suits directed against officers of the states or of the United States.[19] The facts of the instant case involve an alleged conspiracy existing among several private defendants, allegedly acting "under color of law." It is clear, however, that actions of state officials are more likely to be done "under color of law" than the actions of private defendants, because officers of the state are cloaked with the official authority that accompanies their position. For example, in its decision in *Draeger v. Grand Central, Inc.*,[20] the Tenth Circuit considered an action brought under §1983 against a corporate defendant for the actions of its private security guard. The court pointed out

[17] 307 F.2d 797.

[18] See *e.g., Dougherty v. Harper's Magazine Company,* 537 F.2d 758 (3rd Cir. 1976); *Herzog and Straus v. GRT Corp.,* 553 F.2d 789 (6th Cir. 1977); *Council of Federated Organizations v. Mize,* 339 F.2d 898 (5th Cir. 1964); *Winkleman v. New York Stock Exchange,* 445 F.2d 786 3rd Cir. 1971); *Jordan v. County of Montgomery,* 404 F.2d 747 (3rd Cir. 1968).

[19] See *e.g., Clinton v. Los Angeles County,* 434 F.2d 1038 (9th Cir. 1970); *Harmon v. Superior Court of California, supra; Cooper v. United States Penitentiary Leavenworth,* 433 F.2d 596 (10th Cir. 1970) (per curiam); *Urbano v. Calissi,* 353 F.2d 196 (3rd Cir. 1965) (per curiam).

[20] 504 F.2d 142, 146 (10th Cir. 1974)

in its opinion that in cases against private entities "there is less reason for imposing. . . liability. . . since the entire thrust of §1983 requires. . . official State action."[21] The Court added that a private entity "does not have the requisite official character and thus cannot be reasonably concluded to be representing the State."[22] Thus, those cases cited by Petitioners in which action was brought against state officials, rather than private defendants, are factually inapplicable under the facts of the case at bar.

Finally, it should be reiterated that none of Petitioners' cases involve a lack of jurisdiction on the face of the Complaint which is incurable in nature, as in the instant case. Thus, all of Petitioners' cited cases are inapposite.

Respondents respectfully submit that the instant case is not to be treated as the usual dismissal for lack of jurisdiction in a §1983 action. Rather, Respondents submit that neither the original Complaint nor the Petition discloses any basis for a §1983 action. The dismissal here was not on the merits; thus, there is is no *res judicata* effect. Petitioners' Complaint is defective on its face and cannot be cured; thus, an opportunity for Petitioners to be heard would be of no value and need not be afforded.

Furthermore, Petitioners' Complaint must have met the standards of a substantial federal question. It plainly did not, and because this defect was incurable in nature, the dismissal for lack of jurisdiction without an opportunity for the adversely affected party to be heard was entirely proper. As this Court noted in *Hagans v. Lavine*:[23]

> "Over the years the Court has repeatedly held that federal courts are without power to entertain claims. . . if they are 'so attenuated and unsubstantial as to be absolutely devoid of merit.' "

[21] 504 F.2d at 146

[22] *Ibid.*

[23] 415 U.S. 528, 536-7 (1974)

To summarize as to §1983, it is apparent that a district court always has power to dismiss a suit for lack of jurisdiction, and although a court cannot generally dismiss a Complaint for lack of jurisdiction without giving the plaintiff an opportunity to be heard,[24] the courts have clearly recognized an exception to this rule for those situations in which the lack of jurisdiction appears on the face of the Complaint and is obviously not curable.[25] Respondents respectfully submit that the instant case presents such a set of circumstances. In support of this assertion, Respondents point out that a reading of §1983 and the decisions rendered thereunder clearly indicates that a plaintiff bringing an action under §1983 must demonstrate that the defendant(s) has acted "under color of law."[26] Under the authority of *Dennis v. Sparks, supra*, private defendants, such as those in the case at bar, are acting "under color of law" for purposes of §1983, only when they conspire with state officials. Petitioners' Complaint contains no facts or allegations which demonstrate that the private Defendants named therein have so conspired, thus Respondents have not acted "under color of law," and in absence of such action, Respondents cannot be subjected to a suit brought under §1983. As the Tenth Circuit pointed out in its opinion, Petitioners' allegations under §1983 are "patently frivolous." (Appendix A of Petition, p. 31); Petitioners' Complaint was therefore fatally defective on it face and because the defect is not curable, the Complaint fails to present a substantial federal question, thereby depriving this Court's jurisdiction under §1983.

II.

PETITIONERS HAVE NO CAUSE OF ACTION UNDER 42 U.S.C.A. §1985 BECAUSE THEY ARE

[24] *Harmon*, at 797.
[25] *Ibid.*
[26] *Aasum, supra.*

UNABLE TO SHOW THE EXISTENCE OF ANY PARTICULAR CLASS OF WHICH THEY ARE MEMBERS WHICH IS ENTITLED TO PROTECTION UNDER §1985

Turning to §1985, Petitioners have no actionable claim under that section on which the United States District Court could have based jurisdiction. Subsection (1) of §1985 gives to "any person" a right to be free from a conspiracy "to prevent, by force, intimidation or threat" the acceptance of a federal office or to prevent an individual "from discharging any duties thereof."[27] The facts of the instant case do not involve an officer of the United States, as contemplated under the Statute, and because subsection (1) deals solely with those situations involving such an officer, subsection (1) is clearly inapplicable.

Under subsection (2) of §1985, Petitioners must establish a "class-based invidiously discriminatory animus," which is interpreted to mean that the Complaint must allege facts showing that Respondents conspired against Petitioners because of their membership in a class, and that the criteria defining the class were invidious.[28] Petitioners have not demonstrated that they are members of a class against which Respondents have conspired. Subsection (3) of §1985 also requires that there be class based, invidiously discriminatory animus which forms the basis for conspiratorial actions by Respondents. Again, Petitioners cannot show that they have been the victims of discrimination, nor can they show that they are members against any class of which any or all Respondents herein have discriminated.

In general, §1985 deals with conspiracies to interfere with civil rights and is derived from an act of Congress

[27] 42 U.S.C.A. §1985(1)

[28] *Hahn v. Sargent*, 523 F.2d 461 (1st Cir. 1975), cert. den 425 U.S. 904, 96 S.Ct. 1495, 47 L.Ed.2d 754. See also, *Jones v. United States*, 536 F.2d 269 (8th Cir. 1976), cert. den. 429 U.S. 1039, 97 S.Ct. 735, 50 L.Ed.2d 750.

passed in 1861. Reenacted after passage of the Thirteenth Amendment, the statute is based upon that Amendment in its application to private individuals conspiring to deprive black persons of their rights as free men and women.[29] This section requires an invasion of a recognized constitutional right, and protects only those rights embodied in the Constitution and laws of the United States.[30] Failure to plead adequately a claim of racial discrimination would constitute a bar to assertion of any claims under §1985(3) or under the latter portion of §1985(2).[31] Petitioners do not and cannot show the existence of any particular class of which they are members which is entitled to protection under §1985, nor do they show any invidiously discriminatory animus by Respondents, and in the absence of such showings, Petitioners cannot maintain their action under §1985. An opportunity to be heard would be of no value to Petitioners because no such class exists of which they are members, and there have been no invidiously discriminatory practices by Respondents, and in the absence of such facts, there can be no jurisdiction under §1985. Thus, the allegations under §1985 are without foundation; the lack of jurisdiction is obvious from the face of the Complaint; and the jurisdictional defect cannot be cured.

[29] Antieau, *Federal Civil Rights Acts*, 2nd Ed. §260 (1980)

[30] *Bryant v. Harrelson*, 187 F.Supp. 738 (D. Tex. 1960); *Johnston v. National Broadcasting Company, Inc.*, 365 F. Supp. 904 (D.N.Y. 1973).

[31] *Phillips v. Fisher*, 445 F.Supp. at 555.

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that this Petition for Writ of Certiorari should be denied.

Respectfully submitted,

RUSSELL D. MANN
BOB F. TURNER
CHARLES F. MALONE

By 

P. O. Drawer 700
Roswell, New Mexico 88201
(505) 622-6221

Attorneys for Respondents